

COPY

EXHIBIT 7
DATE 2/18/09
HB 424

CLARA GILREATH
CLERK OF DISTRICT COURT

SEP 23 8 06 AM '92

FILED CINDY EVENSON
BY _____

MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

* * * * *

MONTANA ENVIRONMENTAL INFORMATION
CENTER, a Montana non-profit
corporation, and THE MONTANA
FREEDOM OF INFORMATION HOTLINE,
INC., a Montana non-profit
corporation,

Plaintiffs,

vs.

MONTANA DEPARTMENT OF STATE LANDS,
a Department of the State of
Montana,

Defendant,

and

THE MONTANA MINING ASSOCIATION,

Intervenor-Defendant.

* * * * *

Cause No. CDV-92-020

MEMORANDUM AND ORDER

The issue before the Court is whether Section 82-4-
306, MCA, is unconstitutional because it violates Article II,

1 Section 9, of the Montana Constitution. The issue has been
2 fully briefed and is ready for decision.

3 BACKGROUND

4 On November 25, 1991, James Jensen, executive director
5 of the Montana Environmental Information Center (MEIC), wrote
6 Sandy Olsen, chief of the Hard Rock Bureau of the Montana
7 Department of State Lands (DSL), requesting information about
8 four exploration licenses issued by DSL for mining exploration
9 on private land. In his letter Jensen stated that he was
10 especially interested in any restrictions or requirements,
11 including performance bonds, which might have been placed on the
12 licensees relating to hazardous materials management, air and
13 water quality protection and reclamation. He also requested a
14 copy of the environmental assessment DSL had prepared on the
15 exploration permit for the Montanore project, a large explora-
16 tion tunnelling project adjacent to and beneath the Cabinet
17 Mountains Wilderness Area.

18 Relying on the provisions of Section 82-4-306, MCA,
19 Olsen wrote Jensen on November 26, 1991, stating that she could
20 not approve his request to look at specific exploration files
21 concerning private lands. Also on November 26, 1991, Jensen
22 received a press release from Noranda Minerals Corp., owner of
23 the Montanore project, stating that Noranda was interrupting its
24 exploration tunnelling activities at the Montanore project in
25

1 response to an "advisory issued by the Montana Department of
2 State Lands requiring that Noranda Minerals initiate immediate
3 action to reduce nitrate levels in the water of Libby Creek."

4 Plaintiffs filed this action on January 6, 1992. On
5 January 9, 1992, Noranda Minerals' project director for the
6 Montanore project wrote DSL and gave DSL a partial waiver of
7 confidentiality as to the Montanore project. The letter stated
8 that the file does not contain proprietary geological
9 information.

10 DISCUSSION

11 Section 82-4-331(1), MCA, provides that no one may
12 engage in exploration without first obtaining an exploration
13 license from DSL. Under Section 82-4-332, MCA, an application
14 must "include an exploration map or sketch in sufficient detail
15 to locate the area to be explored and to determine whether
16 significant environmental problems would be encountered." The
17 applicant must also submit a plan of operation which provides a
18 detailed description of the proposed exploration activities; a
19 description of the environment potentially affected by the
20 exploration activities; and a reclamation plan.

21 After DSL determines that an application is complete,
22 it evaluates the information submitted; does a site inspection;
23 and prepares an environmental assessment. As part of its
24 review, DSL determines whether conditions should be placed on a
25

1 license. Also, a reclamation bond needs to be posted prior to
2 issuance of any exploration license. After a license has been
3 issued, DSL monitors the licensee to insure compliance with the
4 license requirements and state laws. As part of the monitoring
5 process, the licensee may be required to submit periodic reports
6 to DSL. If it appears that a licensee is not in compliance with
7 its license, DSL may issue a notice of non-compliance and order
8 the licensee to take corrective action. DSL's file on a partic-
9 ular license may contain correspondence, notes from telephone
10 calls and meetings and citizens' complaints.

11 Section 82-4-306, MCA, provides:

12 Confidentiality of application
13 information. (1) Except as provided in
14 subsections (2) and (3), any information
15 obtained by the board or by the director or
16 his staff by virtue of applications for
17 exploration licenses and all information
18 obtained from small miners is confidential
19 between the board and the applicant, except
as to the name of the applicant and the
county of proposed operation; provided that
all activities conducted subsequent to ex-
ploration and other associated facilities
shall be public information and conducted
under an operating permit.

20 (2) Any information referenced in sub-
21 section (1) is properly admissible in any
22 hearing conducted by the director, the
23 board, appeals board, or in any judicial
24 proceeding to which the director and the
applicant are parties and is not confiden-
tial when a violation of this part or rules
adopted under this part has been determined
by the department or by judicial order.

25 (3) The department may disclose

1 information obtained by the board, the
2 commissioner, or department staff from
3 exploration license applications and from
4 small miners for exploration or mining on
5 state and federal lands that identifies the
6 location of exploration and mining
7 activities and that describes the surface
8 disturbance that is occurring or projected
9 to occur. The department may not disclose a
10 licensee's or small miner's proprietary
11 geological information.

12 (4) Failure to comply with the secrecy
13 provisions of this part is punishable by a
14 fine of up to \$1,000. (Emphasis supplied.)

15 Plaintiffs contend that this statute, which requires
16 DSL to keep confidential all information obtained by it from
17 applicants for exploratory licenses or from small miners,
18 irreconcilably conflicts with Article II, Section 9, of the
19 Montana Constitution which provides:

20 Right to know. No person shall be
21 deprived of the right to examine documents
22 or to observe the deliberations of all
23 public bodies or agencies of state govern-
24 ment and its subdivisions, except in cases
25 in which the demand of individual privacy
clearly exceeds the merits of public
disclosure.

The Montana Supreme Court has developed a two-part
balancing test to determine whether a person has a constitu-
tionally protected privacy interest. Montana Human Rights Div.
v. City of Billings, 199 Mont. 434, 442, 649 P.2d 1283, 1287
(1982). First, there must be a determination as to whether a
person has a subjective or actual expectation of privacy. The
second part of the test is a determination of whether society

1 would recognize that expectation as reasonable. In applying the
2 test to the Montana Open Meeting Act, the court stated:

3 However, the right to know is not
4 absolute. The more specific closure stan-
5 dard of the constitutional and statutory
6 provisions requires this Court to balance
7 the competing constitutional interests in
8 the context of the facts of each case, to
9 determine whether the demands of individual
10 privacy clearly exceed the merits of public
11 disclosure. Under this standard, the right
12 to know *may* outweigh the right of individual
13 privacy, depending on the facts.

14 Before balancing these interests,
15 however, it must be determined more
16 precisely what interests are at stake. This
17 determination includes consideration of
18 various facets of the public interest and is
19 required by the language of the right to
20 know provision, which calls for a balancing
21 of the "demands of individual privacy" and
22 the "merits of disclosure."

23 Missoulia v. Board of Regents, 207 Mont. 513, 529, 675 P.2d
24 962, 971 (1984).

25 Here, the interest at stake is proprietary geological
information. In Mountain States Tel. and Tel. Co. v. Department
of Pub. Serv. Regulation, 194 Mont. 277, 634 P.2d 181 (1981),
the court held that corporate trade secrets are entitled to
constitutional protection. The court then applied the balancing
test to determine under what conditions trade secrets could be
publicly disclosed.

 In Belth vs. Bennett, 227 Mont. 341, 740 P.2d 638
(1987), the court upheld the constitutionality of Section 33-1-

1 412(5) which provides that the commissioner of insurance "may
2 withhold from public inspection any examination or investigation
3 report for so long as he deems such withholding to be necessary
4 for the protection of the person examined against unwarranted
5 injury or to be in the public interest." The court found that
6 the statute is an alternative expression of the constitutional
7 privacy exception found in Article II, Section 9, of the Consti-
8 tution, and that the commissioner could only invoke the statute
9 when the demand of individual privacy clearly exceeded the
10 merits of public disclosure. The court went on to note that the
11 statute authorizes the commissioner to make an initial decision
12 as to whether the privacy rights outweigh the need for public
13 disclosure. Belth at 346, 740 P.2d at 641.

14 In this case Plaintiffs are not seeking proprietary
15 geological information. DSL's files, however, contain other
16 information which is not proprietary geological information.
17 The file on the Montanore project, one of those requested by
18 Jensen, does not contain any proprietary information.

19 Unlike the statute at issue in Belth, Section 82-4-
20 306, MCA, does not authorize DSL to make an initial determina-
21 tion of whether the privacy rights of the applicant outweigh the
22 need for public disclosure. Rather, the statute requires DSL
23 keep all information confidential unless the applicant gives DSL
24 a waiver. This is in direct conflict with Article II, Section
25

1 9, and the cases which have interpreted it.

2 DSL argues that the legislature has performed the
3 required constitutional balancing test. The Court disagrees for
4 a number of reasons. First, the statute was enacted in 1971,
5 prior to the adoption of the Constitution. Second, the legisla-
6 tive history does not support a conclusion that the legislature
7 applied the balancing test. Third, Article II, Section 9, is a
8 self-executing provision. Allstate Ins. Co. v. City of
9 Billings, 239 Mont. 321, 780 P.2d 186 (1989). Fourth, in
10 applying the balancing test it is necessary to look at "the
11 competing constitutional interests in the context of the facts
12 of each case, to determine whether the demands of individual
13 privacy clearly exceed the merits of public disclosure."
14 Missouliau at 529, 675 P.2d at 971. Fifth, as the court noted
15 in Allstate, the constitutional provisions control the
16 legislature, not vice versa.

17 For the foregoing reasons, the Court concludes that
18 the blanket provision of Section 82-4-306, MCA, which requires
19 DSL to keep all information confidential, is unconstitutional on
20 its face. This does not mean that everything in DSL's files
21 should now be made available for public inspection. Proprietary
22 geological information is still entitled to protection in
23 accordance with Article II, Section 9. In determining whether
24 information in its files should be made available for public
25

1 inspection, DSL should apply the balancing test established by
2 the decisions of the Montana Supreme Court. If after applying
3 the test there is a dispute as to whether information should be
4 released, the affected parties can petition this Court for
5 appropriate relief.

6 The only remaining issue is whether mandamus is the
7 proper remedy. Mandamus lies only to compel the performance of
8 a clear legal duty. Section 27-26-102, MCA; State ex rel. Swart
9 vs. Casne, 172 Mont. 302, 564 P.2d 983 (1977). The issue here
10 is whether there was a clear legal duty on the part of DSL to
11 make the requested files available to Jensen for inspection.
12 Under the facts of this case, the Court concludes that DSL did
13 not have a clear legal duty to make the files available for
14 inspection and therefore mandamus is not the proper remedy.

15 Section 82-4-306, MCA, specifically prohibited DSL
16 from releasing any information in the files. There is also a
17 strong presumption that a statute is constitutionally valid.
18 McClanathan v. Smith, 186 Mont. 56, 65, 606 P.2d 507, 512
19 (1980). Furthermore, "it is the duty of the courts to uphold
20 the constitutionality of legislative enactments if such can be
21 accomplished by reasonable construction." North Cent. Services,
22 Inc. v. Hafdahl, 191 Mont. 440, 444, 625 P.2d 56, 58 (1981).


23 Finally, the Court notes that failure to comply with the secrecy
24 provisions of Section 82-4-306, MCA, is punishable by a fine of
25

1 up to \$1,000. For these reasons, it was not unreasonable for
2 DSL to refuse Plaintiffs' request to review the files.

3 For these reasons,

4 IT IS ORDERED that the foregoing shall constitute the
5 declaratory judgment of this Court and that judgment should be
6 entered in favor of Plaintiffs in accordance with this
7 Memorandum and Order.

8 DATED this 25th day of September, 1992.

9
10
11 
District Court Judge

12 pc: Karl J. Englund
13 Tommy H. Butler
14 Joe Seifert

15 MEIC.m&o

16 k
17
18
19
20
21
22
23
24
25